Bay Shipbuilding Corp. *and* Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 30–CA–5808

September 17, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 18, 1981, Administrative Law Judge Philip P. McLeod issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order except as revised herein.

The Administrative Law Judge found, and we agree, that Respondent has violated Section 8(a)(5) and (1) of the Act in part by refusing to apply the terms and conditions of its collective-bargaining agreement with the Charging Party to computer loft employees.[2] To remedy this violation, the Administrative Law Judge recommended that these computer loft employees be made whole for any losses they may have suffered as a result of their removal from the bargaining unit and Respondent's failure to apply the terms of the bargaining agreement, specifically with respect to wage differentials, fringe benefit payments, and any other contributions required by the bargaining agreement, with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[3]

In its exceptions, the Charging Party claims that the proposed remedy is insufficient to restore it or the employees represented in the appropriate bargaining unit to the *status quo ante* and allows Respondent to reap and retain the benefits stemming from its unlawful conduct. Specifically, the Charging Party claims that unit employees with more seniority than those assigned to the computer loft[4] have been adversely affected by Respondent's misconduct by being denied the opportunity to be assigned such loft positions rather than face a layoff. The Charging Party also requests reimbursement for dues lost as a result of Respondent's misconduct.

In reviewing the Charging Party's claims in light of the evidence, the record shows that part of Respondent's motive for excluding computer loft employees from coverage under the bargaining agreement was a desire to separate these employees from the remaining loft employees and other employees forming a common seniority pool created for purposes of layoff and recall. The Administrative Law Judge's remedy, however, does not specifically restore the unit employees who had been transferred to the computer loft to this pool without loss in their seniority rating, nor does it seek to make whole other unit employees who may have been adversely affected by Respondent's misconduct. Accordingly, in order to return the parties to the *status quo ante*, we shall revise the Administrative Law Judge's remedy to make whole all unit employees for any losses resulting from Respondent's misconduct,[5] and we shall order that the computer loft employees be included in the same seniority pool as other loft employees with no loss of seniority. As the record contains no evidence that any employees have been laid off out of order of their seniority, we shall leave to the compliance stage of this proceeding an exact determination of other measures necessary to restore the *status quo ante*. However, we shall modify the recommended Order to specify that nothing therein shall be construed as requiring the rescission of any of the benefits granted computer loft employees.[6]

We shall also revise the Administrative Law Judge's recommended remedy as it relates to interest on fringe benefit payments. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] See *Wisconsin Contractors, Inc.*, 183 NLRB 872 (1970).

[3] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[4] The relevant bargaining agreement provision groups loft employees and several other classifications in a single suboccupational group for purposes of layoff and recall.

[5] Member Jenkins would award interest on lost wages in accord with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[6] In the absence of evidence of Respondent's noncompliance with a dues-checkoff procedure with respect to unit employees, we find no merit in the Charging Party's claim that it should be reimbursed for lost dues. See *Rockwell Printing and Publishing Co., Inc. d/b/a Monument Printing Co.*, 231 NLRB 1215, fn. 3 (1977).

order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bay Shipbuilding Corp., Sturgeon Bay, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following to paragraph 1(b): "provided, however, that nothing herein shall be construed as requiring rescission of any wage increase or other benefits which previously have been granted to computer loft employees."

2. Add the following to paragraph 2(b): "and include computer loft employees in the suboccupational group with other loft employees with no loss of seniority."

3. Substitute the following for paragraph 2(c):

"(c) Make all unit employees whole for any losses they may have suffered by reason of Respondent's failure to apply the terms of its 1977–80 collective-bargaining agreement, or any succeeding agreements, to them in the manner prescribed in the Board's Decision."

4. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

5. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and bargain with Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, as the exclusive bargaining representative of computer loft employees as part of the appropriate bargaining unit.

WE WILL NOT refuse to apply the terms and conditions of our collective-bargaining agreement with the Union to computer loft employees; provided, however, that nothing herein shall be construed as requiring rescission of any wage increase or other benefits which previously have been granted to computer loft employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL recognize and bargain with the Union and honor the 1977–80 collective-bargaining agreement, and any succeeding agreements, with the Union with respect to computer loft employees and include them in the same suboccupational group with other loft employees with no loss of seniority, as part of the following appropriate bargaining unit:

All production and maintenance employees who come under the jurisdiction of Local Lodge No. 449, of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, at our Sturgeon Bay, Wisconsin, yard, excluding

watchmen, supervisors, office workers, draftsmen, guards and office janitors.

WE WILL make whole all bargaining unit employees for any losses they may have suffered by reason of our failure to apply the terms of the 1977–80 collective-bargaining agreement, or any succeeding agreements, to them, with interest.

BAY SHIPBUILDING CORP.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge: A charge was filed in this case on May 8, 1980,[1] by Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (herein called the Union), against Bay Shipbuilding Corp. (herein called Respondent). The Acting Regional Director for Region 30 issued a complaint and notice of hearing dated June 26, alleging violations by Respondent of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended (herein called the Act).

A hearing was held before me in Sturgeon Bay, Wisconsin, on February 17–19 and March 10–11, 1981, at which the General Counsel, the Union, and Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, all parties filed briefs which I have duly considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a wholly owned subsidiary of Manitowoc Company, Inc., builds and repairs ships used primarily on the Great Lakes. Respondent admits it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Allegations and Issues*

The complaint alleges that in March and April 1980 Respondent violated Section 8(a)(5) of the Act by having unilaterally "determined that, as a result of the installation of new equipment, certain tasks heretofore done by employees within the unit . . . would no longer be performed by said employees, but would be performed only by employees not represented by the Union, and that employees from the . . . bargaining unit who chose to operate the new equipment could no longer remain in the bargaining unit or be represented by the Union." Although the complaint alleges that Respondent violated the Act by having "determined" that these things be done, it is clear that the General Counsel's complaint is really addressed to the fact that Respondent implemented its determination.

In its answer to the complaint, Respondent admits certain matters, including the appropriateness of the bargaining unit and the history of collective bargaining between the parties, but denies having engaged in any acts which might constitute an unfair labor practice as alleged in the complaint.

The gravamen of Respondent's position is that, pursuant to the management-rights clause of the collective-bargaining agreement between it and the Union, Respondent simply established a new department outside the bargaining unit represented by the Union and thereafter offered people in the unit a chance to be promoted to positions outside the unit. Respondent enumerates several other "affirmative defenses" in its answer, but it is clear from its position expressed at the hearing that each of these relates to its major defense that the Union waived any rights to object to the action which it took because such action was authorized by the management-rights clause of the parties' collective-bargaining agreement.

B. *The Change in Operations*

Respondent employs approximately 1,500 people. Four unions represent various groups of its employees. Three of the unions represent relatively small bargaining units. The Union herein represents by far the largest unit, described simply as a production and maintenance unit, which is comprised of more than 1,000 employees. Neither party disputes the fact that for numerous years the department known as "the loft" has been a part of that unit represented by the Union.

In the loft, employees take information regarding a ship to be built and, part by part, determine what shape each three dimensional part would have if laid flat. They then produce full-size layouts of the parts from which templates are made of wood or plastic. The templates are used as a guide or pattern for cutting the pieces out of flat steel sheets. After the templates are produced, employees in the loft have traditionally used them to "nest" material. Nesting is the efficient placing of the pieces to be cut within the outside parameters of a piece of steel stock from which they are to be cut so as to minimize waste material.

For many years, Roy Aiken, Respondent's operations manager and the individual to whom the loft supervisor reported, harbored the belief that Respondent should pursue developing technology for computerized lofting. Beginning in mid-1979, Aiken began to actively pursue the prospect of computerized lofting, including making a trip to Norway to observe available technology firsthand. In November 1979, Aiken gave Corporate President Art Zuehlke a detailed memorandum recommend-

[1] Unless otherwise indicated, all dates hereinafter refer to 1980.

ing that Respondent purchase a computerized lofting system. In a memorandum dated February 18, 1980, Aiken recommended the purchase of a specific system.

In late 1979 or early 1980, the exact date being unknown, the first discussion occurred among management personnel regarding whether the computerized loft should be staffed with bargaining unit or nonbargaining unit personnel. During this discussion, which occurred between Aiken, Corporate Vice President Robert Miller, and Industrial Relations Director Jordan Woods, Miller stated that he wanted employees in those positions to be nonunion because of past problems with the labor agreement as a result of loft employees being in the same seniority group as shipfitters and other employees in the boilermaker unit. Miller stated he did not want to risk laying off skilled loftsmen because of a layoff of shipfitters. Miller was referring to an earlier situation when Respondent was confronted with a layoff and because certain employees in the loft had less seniority than shipfitters, Respondent was required to lay off loftsmen and train shipfitters to work in the loft. Woods agreed with Miller that for this reason employees performing computerized lofting should be excluded from the Union's bargaining unit.

During January and February 1980 employees and representatives of the Union began to hear rumors about the prospect of a computerized loft. About the same time, they also noticed the loft supervisor and other nonbargaining unit personnel performing unit work. On February 19, the Union filed a grievance regarding the latter matter. Paul Seiler, the Union's president, approached Aiken with the grievance. Seiler told Aiken that the real purpose of the grievance was to find out about any plans for computerized lofting because employees were nervous about whether they would be retained if such a system were adopted. Aiken told Seiler that he would agree to meet regarding the grievance but that he wanted all loftsmen to be present. Thereafter, such a departmentwide meeting was held. At this meeting, Aiken informed employees and representatives of the Union that plans were underway to establish a computerized loft. Aiken assured employees that Respondent was going to utilize current loft employees for the new computerized system because their experience was needed. Aiken was asked whether employees performing computerized lofting would be Union or not. According to Union President Seiler and employee David Brooks, Aiken responded that computerized lofting positions would be union positions. Aiken denied making this statement. I conclude that Aiken did make the statement, largely because Seiler's testimony is corroborated by Brooks who impressed me as a very trustworthy witness. Further, Aiken admits that he told employees that there were no plans to make the computerized loft positions nonunion. Following the meeting, the grievance was withdrawn.

On April 1, a meeting was held among Zuehlke, Miller, Aiken, and Woods to make a final decision regarding the computer lofting program. A decision was made to purchase the computerized program recommended by Aiken and to locate the new equipment in an area of the same building which houses the existing loft and the "burn shop" where ship parts are cut from metal stock. At this meeting, there was also discussion regarding staffing and supervision of the computerized program. It was decided that current loft employees would be used to operate the new computerized equipment because of their familiarity with the shipyard operations and with the kind of work that would be done with the computerized system. It was also decided that the computerized system would be supervised by the manager of the planning department, but, before the system was ever instituted, Respondent decided instead to use the same individual to supervise the existing loft and employees in the computerized system. Finally, at this April 1 meeting there was considerable discussion whether Respondent was going to treat employees utilized in computer lofting as being within or outside the bargaining unit represented by the Union. Aiken, Miller, and Woods all recommended to Zuehlke that Respondent treat those employees as being outside the unit. Woods testified that two basic reasons were expressed in support of this recommendation: (1) the problem related to layoffs which is described above and (2) a concern that there could be a strike when the then current collective-bargaining agreement expired and Respondent did not want loft employees to strike.[2] Zuehlke agreed to exclude computer lofting from the bargaining unit. Prior to the conclusion of the April 1 meeting, Zuehlke directed Aiken and Woods to meet with the Union to announce the Company's decision.

Later in the day on April 1, Aiken, Woods, and Woods' assistant, George Savage, met with representatives of the Union. Woods began the meeting with the Union by telling it that Respondent had been planning computer lofting for some time and that it had made some decisions. Woods informed the Union that employees from the existing loft would be utilized in computer lofting but that such employees would be outside the bargaining unit represented by the Union. Woods stated that Respondent's decision was final but subject to review if Respondent felt it was necessary, and asked the Union for its reaction. Seiler, the Union's president, said that he would not go along with the decision because it was taking union work away from the unit. Respondent countered that the process of computer lofting was entirely different from manual lofting, that the method of accomplishing the work is different, and that employees

[2] Woods also testified that another reason for the recommendation was that Respondent plans on transferring employees performing that work to the engineering department where employees are unrepresented, and Aiken, Miller, and Woods did not think it was a good idea to mix union and nonunion employees in the same department. Woods did not indicate when this transfer would take place, what would be involved in such a transfer other than a paper change in corporate structure, or whether in fact any firm decision had been made to make such a transfer. Aiken originally testified that such a transfer would take place "eventually." He later testified that the transfer would not occur for approximately 2 or 3 years. Finally, he testified that the transfer would be 3 to 5 years in the future. I conclude that this asserted additional reason was insignificant. Respondent's witnesses were so unsure when such a change might occur that I conclude there are no firm plans to make this change. Further, even if I were to consider this reason relevant, I note that Respondent's expressed dislike for mixing union and nonunion employees in a single department is, as expressed by Respondent itself, based on union membership considerations rather than on functional job relatedness.

involved in computer lofting would receive a great deal of training. Seiler answered that Respondent was still taking work away from the unit and the Union was not going to go along with Respondent's decision. I credit Seiler that, during this discussion, Woods referred to the management-rights clause of the collective-bargaining agreement between the Union and Respondent as the basis for Respondent's decision and further that Seiler responded that such a clause did not give Respondent the right to take work from the unit.

Respondent and the Union had further meetings and discussions regarding Respondent's decision on April 23 and June 17, 1980. In both of these meetings, as well as in a third meeting which may have occurred between the other two, the positions of both parties remained unchanged. Respondent steadfastly insisted that employees assigned to perform computer lofting work be nonunion. The Union insisted that lofting work was unit work and employees assigned to perform such work, whether by hand or with the use of computers, were unit employees. During the April 23 and June 17 meetings, as well as during the April 1 meeting, there was considerable discussion about whether employees assigned to computer lofting would be allowed the 180-day probationary period provided for in the collective-bargaining agreement in which employees transferred outside the bargaining unit are allowed to return to the unit in the event the employee decides that he/she does not desire the transfer. Respondent wanted employees to be allowed to utilize that provision. The Union maintained that the contract provision was not applicable since employees assigned to perform computer lofting would still be in the bargaining unit. I discredit testimony proferred by Respondent that at the June 17 meeting Seiler agreed to apply the 180-day probationary period to employees assigned computer lofting. I credit Seiler that he never made such an agreement or any statement to that effect. It is clear throughout the record herein that the Union never strayed from its consistent position that employees assigned to computer lofting were a part of the existing bargaining unit it represents.

From July 9 to August 25, Respondent and the Union met in approximately 15 bargaining sessions to negotiate the terms of a new collective-bargaining agreement. Woods testified that computer lofting was brought up on one occasion during the second negotiation session. Woods testified that Respondent proposed separate seniority lists for certain groups, including the loft. The separate seniority list was only for the existing loft and not for employees assigned to computer lofting. According to Woods, the Union stated it would not consider such a proposal. Woods testified that Respondent then stated that such a proposal was not only the way to resolve past problems regarding layoffs but also the way to reach agreement on computer lofting. Woods testified that Seiler responded he would not talk about computer lofting because that problem was before the courts, referring to the Board. Seiler denied that computer lofting was ever mentioned in bargaining. While Woods impressed me as a man who was attempting to do no more than tell the truth, I conclude he is in error to the extent his testimony suggests that Respondent proposed employees assigned computer lofting be in the Union's bargaining unit but carried on a separate seniority list. Both Respondent's and the Union's minutes of the bargaining session in question contain reference to a proposal regarding separate seniority lists for certain groups of employees, but neither contains a reference in this regard to computer lofting. Further, in spite of the inference of Woods' testimony described above, I note that elsewhere Woods testified, "We wouldn't have discussed computer loftsmen at all in negotiations with respect to the seniority list." There is no other testimony or suggestion that the subject of computer lofting was discussed in negotiations and I conclude that it was not.

In early July 1980, loft employee David Brooks approached Corporate President Zuehlke independently to determine if a resolution of the problem regarding computer lofting could be worked out. Zuehlke told Brooks that the decision to make computer lofting nonunion had been made and it would not be changed. Zuehlke also told Brooks that the manual loft was the nerve center of the shipyard, and, because it was such a valuable trade, it should never have been in the bargaining unit in the first place.

C. *Assignment of Employees to Computer Lofting*

Beginning shortly prior to, and continuing after, the April 1 meeting at which Respondent decided to institute computerized lofting and to make it nonunion, Operations Manager Aiken called loft employees into his office individually for private interviews. Employees testified to a single meeting with Aiken, while Aiken testified that he met with most employees twice, once to explain Respondent's concept of computerized lofting in general terms and a second time to ascertain the individual employee's interest in the program. I find it unnecessary to resolve the potential conflict in testimony in this regard for Aiken does not contradict nor deny testimony of employees regarding what took place. The testimony of interviewees, which I credit, reveals that, after being directed to Aiken's office, Aiken explained in broad terms Respondent's plan to institute computerized lofting. Aiken then informed each employee that the computerized lofting system would be a "company," i.e., nonunion, position. Aiken asked each employee individually if he would agree to accept such a job on those terms. If any employees expressed any reservation about accepting the job as a nonunion position, as was the case with employees David Frisque and Daryl LeCloux, they were given a choice by Aiken whether to be considered for computer lofting (as a nonunion position) or remain performing manual lofting (and continue to be recognized as part of the bargaining unit represented by the Union). Aiken informed employees if they chose to remain in a bargaining unit manual lofting position, as computer lofting took over more and more of the work from manual lofting, the number of employees performing manual lofting would dwindle and eventually the few remaining employees would be transferred to other bargaining unit jobs in the yard.

With regard to these interviews, Aiken himself testified:

> Now, after such time as when we had made the decision that we were going to make this a non-union or Company position, Company department, I began to assess from these people whether or not they had any qualms about being associated either with a Company position or a Union position.

In explaining certain marks which Aiken made on notes he took during these interviews, Aiken testified:

> I've got a couple of notes like, OK, or, OK here. That man is X'd out. This man has an X by his name. This man has an X by his name indicating to me that there was reluctance on their part to take part in what we wanted to do.

In further clarification of these notes, which contain the word "Union" next to or underneath certain individual's names, Aiken testified:

> Q. (By Counsel for the General Counsel) Why put Union down? What was the significance of the word Union?
>
> A. (By Aiken) He had indicated to me that he wasn't interested.

From the testimony of interviewees, as well as from that of Aiken, I conclude that, as well as explaining computerized lofting to employees in broad terms, Aiken specifically conditioned assignment to computerized lofting on employees' willingness to abandon the Union as their collective-bargaining representative.

Jon Schauske, who had worked in the loft for approximately 2-1/2 years in a bargaining unit position, was assigned in March 1980 to begin overseeing the actual utilization of computer lofting. In April, Schauske was given the title of autokon coordinator. On May 1, Greg Lake, who had worked in Respondent's loft for more than 5 years, was given the title autokon training coordinator and assigned to work with Schauske in the introduction of computerized equipment. On June 1, Eugene Ehlers, also a loft employee, was assigned the title assistant autokon coordinator and assigned to work with Schauske and Lake. Then on July 22, David Frisque, Randy Hendrickson, James Nowicki, and Robert Moore were the first employees assigned computer lofting work of a purely nonsupervisory nature. Prior to this assignment, all of these individuals had worked in the loft performing manual lofting. On November 14, five more employees were assigned computer lofting. All were manual loft employees.

When Respondent adopted the computerized lofting program, it chose to do so by designating computer lofting as a separate department. Contrary to the intention it expressed earlier, Respondent never assigned that department administratively to the planning section. Rather, it left the department under the ultimate supervision of Production Manager Aiken. Effective December 15, 1980, Schauske was officially designated supervisor of computer lofting and at the same time supervisor of the manual loft. After the official designation of Schauske as supervisor of both departments, on February 23, 1981, two additional employees were assigned to computer lofting. Like the others, these employees also came from the loft. The only employee assigned to the computer lofting department who did not come from the existing loft was a computer entry clerk who, unlike the others, does not write programs but types them into the computer memory banks using a computer keyboard.

After the transfer of employees to computer lofting was complete, five persons remained working in the existing manual loft. Three of these people were experienced loftsmen while two were transferred to the loft from shipfitting. How many of these employees may expect to continue to perform manual lofting duties is unknown, although Respondent has consistently stated that it expects to always have some need for manual loftsmen. The number of such employees, if any, will depend on the extent to which Respondent elects to continue to adopt computerized techniques of shipbuilding.

On January 22, 1981, Frisque, Hendrickson, Nowicki, and Moore, the four people assigned to computer lofting on July 22, 1980, were told by Schauske to do what they had to do to get out of the Union because it was the end of their 6-month probationary period. The four employees then went and reported this to the Union. Although the Union did not agree that these employees were outside its bargaining unit, and in fact implied not too subtly that it might choose to blackball such employees from the Union in the future, the Union finally decided to allow such employees to pay out-of-work dues until the instant case could be resolved.

D. *Comparison of Manual and Computer Lofting*

Both manual lofting and computer lofting are skilled jobs requiring a basic education in mathematics, geometry, blueprint reading, and welding technology. Employees in the manual loft each participate in a training program lasting approximately 4 weeks. Following this formal training program, they may then serve an informal apprenticeship as loft employees which may last as long as a year. Before being assigned to computer lofting, loft employees received varying degrees of additional training. The first group of nonsupervisory employees assigned to computer lofting received approximately 6 weeks of training, part formalized and part on the job. The second group received 2 weeks of formalized training and 3 days of on-the-job training.

The function of loftsmen in both manual and computer lofting is to take part of a ship and determine what shape that part would have if laid flat so that the part can be cut or "burned" from flat steel stock. In manual lofting, loftsmen use blueprints and tables-of-lines-and-offsets to physically draw three different views of the piece that is being worked on. These views are drawn full size on sheets of plastic in order to create a template which the "burn machine" follows in order to actually cut the piece in question from flat steel stock. In making the templates, loftsmen use straightedge, compass, and fairing batton, the latter item being a tool used to assure that curves are smooth. In computer lofting, loftsmen also use blueprints and tables-of-lines-and-offsets from which they prepare at least one view to scale. The primary function of loftsmen in computer lofting is to write a manuscript

which is a set of orders using numerical codes in order to tell the computer the shape of a desired part. The computer is able to automatically fair lines so that it is unnecessary to do so with a fairing batton. When this procedure is complete, the ultimate result is that loftsmen have produced the "manuscript" or set of instructions using numerical codes which are fed electronically into advanced cutting equipment such that the desired piece is cut from steel stock without the need for a physical template being produced.

Another important function of both manual and computer lofting as suggested earlier in nesting; i.e., the aligning of various pieces which are to be cut from a single piece of stock so as to minimize scrap material. In manual lofting, this is literally performed by hand by laying out and aligning templates in order to attempt to come up with the most efficient combination. In computer lofting, this is performed completely automatically by the computer itself, thereby achieving the most efficient use possible of raw materials.

Since the establishment of computer lofting, there has been substantial interaction between employees performing computer and those performing manual lofting. In addition to both departments having the same supervisor, certain jobs are worked on jointly which results in daily contact. For example, for pieces which are either too small or do not fit easily on stock material, computer lofting employees make production sheets which they give to manual loft employees to use to make plastic templates so that the item may be cut in that manner rather than by a coded machine. Employee David Brook, whom I credit, testified that this and other joint tasks results in almost daily contact between employees in the two groups.

IV. ANALYSIS AND CONCLUSIONS

The essence of what occurred in this case can be stated rather simply. During the long bargaining history between Respondent and the Union during which employees in the loft were always considered a part of the bargaining unit, various representatives of Respondent, including Corporate President Zuehlke, came to the conclusion that such employees should have never been included in the bargaining unit. This is revealed both in the testimony of employee Brooks regarding his conversation with Zuehlke and in the testimony of Aiken and Woods regarding their recommendations to Zuehlke at the April 1 meeting. As a result, when Respondent decided to introduce new and technologically advanced equipment for lofting, it also decided to take that opportunity to remove lofting employees from the Union's bargaining unit. Having made that decision, it hoped to obtain the Union's agreement, and attempted to do so in meetings with union representatives. The Union, however, would have no part of it, and steadfastly held to its position that lofting employees, regardless of the tools they used to perform their work, always have been and must continue to be a part of its unit. Neither party has been willing to alter its position, and thus the case is before me for resolution.

In *Columbia Tribune Publishing Co.*, 201 NLRB 538 (1973), the Board was presented with a fact situation strikingly similar to the instant case. For numerous years the union therein had represented employees in the employer's composing room. As a result of technological advances the employer undertook to convert its printing operation from a hot metal process for producing newsprint to a photocomposition process. The union was aware that such a changeover was under consideration, did not object to it, and in fact began to train its unit members to operate equipment used in the new process. In spite of significant changes in the actual job tasks of employees, and although the new tasks required substantially less training and skill than had previously been required of composing room employees, the Board specifically stated in affirming the decision of the Administrative Law Judge that "The conversion by the Respondent of this operation from a hot metal to a cold type process neither impaired the appropriateness of the unit nor the Union's representative status." In explaining its rationale, the Board stated, "Although the method of operation of the composing room has been changed from hot metal to a cold type process, the function of the composing room has remained the same . . . ." Consequently, the Board concluded that the employer therein had bargained in bad faith by insisting to the point of impasse that the jurisdiction unit clause of its collective-bargaining agreement with the union be substantially altered.

In *Rice Food Markets, Inc.*, 255 NLRB 884 (1981), the employer converted liquor departments within grocery stores to separate liquor stores as a result of a change in state law. Employees within those departments had theretofore been part of the overall unit of grocery store employees represented by the union. After establishing the separate liquor stores and transferring liquor department employees to them, the employer thereafter refused to recognize that such employees were a part of the bargaining unit represented by the union. The Board concluded that such a change did not justify the employer in treating these employees as outside the unit. Although in that case the effected change was in the employer's method of doing business rather than in the actual job duties or tasks of employees, the case was decided upon principles which are directly applicable to the instant situation. As was stated therein (at 886–887):

> [W]hether Respondent should have continued to recognize the union depends on whether the changes effected were sufficient to remove those employees from the bargaining unit represented by the union for at least the past 10 years.
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> * * * * *
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> [A] division of an existing facility cannot and should not be reviewed in precisely the same manner as the addition of a new facility or facilities. Even in circumstances where a new facility would not be viewed as an accretion . . . it would not necessary follow that the spunoff portion of an existing facility would no longer be considered part of the overall existing unit.

> In practical effect, there is a heavy burden on a party seeking to prove "accretion" to show that the group sought to be added to an existing unit is an "accretion" within the meaning of the Board's long-standing use of that term, whether it be a union claiming that group (in an 8(a)(5) case, for example), or an employer seeking to justify its recognition of that group (in an 8(a)(2) case, for example). When, as here, an employer attempts to justify *removing* a particular group or groups from the coverage of a collective-bargaining agreement or relationship, it has the burden of showing that the group is sufficiently *dissimilar* from the remainder of the unit so as to warrant that removal.

In the instant case, Respondent argues that it (1) established a new department which it decided to place outside the bargaining unit represented by the Union, and that it (2) then offered people in the bargaining unit the chance to be promoted outside the unit. Respondent argues that it had the right to take the action it did pursuant to the management-rights clause of its collective-bargaining agreement with the Union. At all times relevant to this case, the language of the management-rights clause has remained unchanged. The portions of that clause cited by Respondent witnesses as the basis for Respondent taking the action it did provide:

> The company shall have the right to exercise all the rights or functions of management except as otherwise specifically provided in this Agreement. Subject to the provisions of this Agreement and without limiting the generality of the foregoing, the term, "Rights of Management" includes:
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> * * * * *
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> B. The right to direct the working forces, including the right to hire, promote or transfer any employee, subject to the seniority provision of Article VIII.
>
> C. The right of location of the business, including the establishment of new plants or departments, divisions or subdivisions thereof.
>
> D. The right of relocation or closing of plants, departments, divisions or subdivisions thereof.
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> * * * * *
>
> I. The right to the determination of the organization of any department, division or subdivision thereof, deemed appropriate by the Company.
>
> J. The right of selection, promotion or transfer of employees to supervisory or other managerial positions, or to positions outside the bargaining unit, not to the prejudice of any employee who may wish to decline the promotion of transfer.
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> * * * * *
>
> R. The right to the introduction of new, improved or different production, maintenance, service or distribution methods or facilities, or a change in existing methods or facilities.

From the language of this clause, it is clear that Respondent has the right to establish new departments. It is equally clear that Respondent has the right to transfer employees to existing positions outside the bargaining unit. In other words, the first and third elements of Respondent's argument are clearly supported by the language of that clause. Indeed, the Union does not and never has argued otherwise and, in fact, *expressly recognizes these rights in its brief.*

Respondent, in its brief, argues that "The Company's right to designate the new department as 'Company—i.e. non-unit-is clear.'" Yet Respondent does not cite a single Board or court case for that proposition, and I have found none. Further, Respondent does not point to any language in its management-rights clause which gives it that right. Regardless of how Respondent may frame its argument in terms of its right to establish new departments or transfer employees to positions outside the unit, the fact remains that in establishing the new department Respondent referred the work of the majority of loft employees, as well as the employees themselves, to the new department. In reality Respondent is attempting to justify removing a group of employees and their work from the collective-bargaining relationship. I conclude that Respondent does not have the right to simply designate that group henceforth as nonunion, but rather Respondent has the burden of showing that the group is sufficiently dissimilar from the remainder of the unit so as to warrant its removal. *Rice Food Markets, Inc., supra.*

In this case, there is no doubt that there have been changes in the job duties and tasks of the affected employees. Nevertheless, the similarities between the work performed by these employees before and after the changes, as well as the continuing relationship between computer and manual lofting employees, far outweigh the differences effected by those changes. The function of loftsmen in both manual and computer lofting is identical and the differences arise only in the manner in which this function is carried out. Both manual and computer lofting are skilled jobs requiring the same basic education in mathematics, geometry, blueprint reading, and welding technology. Similarities between the jobs are highlighted by the fact that with the single exception of a computer entry clerk, every employee assigned to computer lofting, including the supervisory structure, came from Respondent's existing loft. Further, since the introduction of computer lofting, the same individual has been used as supervisor for both computer and manual lofting. Finally, since the establishment of computer lofting, there has been substantial interaction on an almost daily basis between manual and computer lofting employees. Based on all of these factors, I conclude that the bargaining unit that existed prior to the introduction of computer lofting, including all employees performing lofting functions, is still a viable unit, that the Respondent has not demonstrated otherwise, and that the General Counsel has amply shown such to be the case.

I find nothing in the collective-bargaining agreement between Respondent and the Union which authorizes

Respondent to unilaterally redesignate unit work as nonunit, and I find nothing therein to suggest that the Union has waived its right to represent unit employees now or at any time in the future. Similarly, Respondent's argument that the complaint herein is contrary to the policies of the Act because the Union's rights might have been pursued through other proceedings, including a unit clarification petition and/or arbitration, is rejected. With respect to the possibility of this matter having been resolved by a unit clarification proceeding rather than by an unfair labor practice proceeding, I note that Respondent, having chosen to resolve the matter by itself, rather than by filing a "UC" petition, is now in a position where it has violated the Act if it took an erroneous view. The unit clarification route would not provide any remedy for such a violation. With regard to the possibility of this matter having been resolved through arbitration, I note that Respondent has specifically stated it is not requesting that the matter herein be deferred subject to the Board's *Collyer* deferral policy. (*Collyer Insulated Wire, A Gulf and Western Systems, Co.*, 192 NLRB 837 (1971).) Rather, Respondent argues that, by not proceeding to arbitration, the Union is somehow precluded from exercising its rights under the Act and asks that the complaint be dismissed on the merits. The cases cited by Respondent in support of that argument bear no relationship to any issue in this case and offer no support for Respondent's argument that the Union herein is precluded from pursuing its statutory rights.

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, Bay Shipbuilding Corp., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The collective-bargaining unit described in the parties' current and most recent collective-bargaining agreements as "All production and maintenance employees who come under the jurisdiction of Local Lodge No. 449, of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, at its Sturgeon Bay, Wisconsin, yard, excluding watchmen, supervisors, office workers, draftsmen, guards and office janitors" constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of all employees in the aforesaid bargaining unit, and by refusing to apply the terms and conditions of the collective-bargaining agreement with the Union to computer lofting employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices which Respondent has been found to have engaged in affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

In its brief, the Union requests that the appropriate remedy include an order requiring Respondent to recognize the Union as the bargaining representative of employees performing computer lofting and to make whole employees for any losses they may have suffered as a result of Respondent's removing them from the bargaining unit and thereafter failing to apply the terms of the collective-bargaining agreement to such employees, including the payment of pension, health, and welfare payments required by the bargaining agreement. The part of the Union's requested remedy is appropriate and entirely in conformity with the Board's usual remedies in similar cases. *Rice Food Markets, Inc., supra.* The Union also asks to be reimbursed for dues lost as a result of Respondent's unlawful removal of employees from the unit. This element of the Union's requested remedy, however, has heretofore been specifically rejected by the Board. *California Blowpipe & Steel Company, Inc.*, 218 NLRB 736, 754 (1975), and cases cited herein. Therefore, I shall not recommend that the Board order such a remedy in the instant case.

Accordingly, Respondent shall be ordered to recognize the Union as the representative of computer lofting employees as part of the overall bargaining unit and make whole those employees for any losses they may have suffered as a result of Respondent's failure to apply its 1977-80 contract, or any succeeding contracts, to those employees by payment to them of any wage differential from the contract rate, and by making all pensions, health, and welfare payments and any other contributions required by the bargaining agreement. Any backpay is to be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Bay Shipbuilding Corp., Sturgeon Bay, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, as the exclusive bargaining representative of computer lofting employees as part of the unit found appropriate herein.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to apply the terms and conditions of its collective-bargaining agreement with the Union to its computer lofting employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following action in order to effectuate the policies of the Act:

(a) Recognize and bargain with Local 449, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, as the exclusive bargaining representative of employees in the collective- bargaining unit found appropriate herein, including computer lofting employees.

(b) Honor its 1977–80 collective-bargaining agreement with the Union, and any succeeding agreements, with respect to computer lofting employees found to be part of the appropriate bargaining unit herein.

(c) Make the aforesaid computer lofting employees whole for any losses they may have suffered by reason of Respondent's failure to apply the terms of its 1977–80 collective-bargaining agreement, or any succeeding agreements, to them in the manner prescribed in The Remedy herein.

(d) Post at its Sturgeon Bay, Wisconsin, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 30, shall be signed by an authorized representative of the Company and posted by it immediately upon receipt thereof and maintained by it for it 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."